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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-645

JIMMY T. SMITH, an Individual, and SMITH SALES COMPANY, a Corporation,
Petitioners

vs.

SCRIVNER-BOOGAART, INC., a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on June 21, 1971. Petition for Rehearing was denied on October 22, 1971.

CITATIONS TO OPINIONS BELOW

No opinion was written by the District Court in this case. The Findings of Fact and Conclusions of Law, entered on March 26, 1970 by the District Court, is unreported (R* 73a) and is printed in Appendix "A" hereto, *infra*, App. A, A1. The opinion of the Tenth Circuit filed June 21, 1971, affirming the judgment of the District Court is reported at 1971 CCH Trade Cases par. 73,611. (App. B, A3).

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on June 21, 1971. Petition for Rehearing, filed by Petitioner on July 2, 1971, was denied by the Circuit Court on October 22, 1971. (App. C, A12). Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether, under Section 1 of the Sherman Antitrust Act and Section 3 of the Clayton Act, a written and executed contract under which independent grocery retailers are expressly required to buy goods, wares and other commodities exclusively from a named grocery wholesaler is illegal per se when the contract is standing alone or is considered in light of the further contractual requirement that the independent retailers participate in certain defined services performed by the wholesaler including an advertising program that involves admitted price fixing?

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*References to pages of the record certified to this Court by the Clerk, United States Court of Appeals for the Tenth Circuit, will be to the two volumes of Appendix of Petitioner filed in the Tenth Circuit and will be designated by "R" followed by the appropriate page numbers in said Appendix.

2. Whether the trial court so departed from the accepted and usual course of judicial proceedings in antitrust cases by permitting the defendant-Respondent to introduce evidence to justify anticompetitive practices; by commenting on the evidence of plaintiff-Petitioner concerning the proof of damages; by its instructions concerning the proof of damages; by refusing to issue instructions that practices of Respondent were illegal per se; and by allowing the jury to pass on the ultimate issue of liability?

STATUTORY PROVISIONS

Statutes involved in this case are as follows: Section 1 of the Sherman Antitrust Act, 15 U.S.C. sec. 1; Section 3 of the Clayton Act, 15 U.S.C. sec. 14; Section 4 of the Clayton Act, 15 U.S.C. sec. 15; Section 12 of the Clayton Act, 15 U.S.C. sec. 22; and Section 16 of the Clayton Act, 15 U.S.C. sec. 26. The foregoing statutes are printed in Appendix "D", *infra*, App. D, A13.

STATEMENT OF THE CASE

1. The Facts

Petitioners own and operate a small independent wholesale business that sells principally to retail grocery stores a line of automotive accessories and supplies such as motor oil, antifreeze, car wax, oil filters, and similar items. Jimmy T. Smith started this small independent business in 1965, and incorporated it on October 28, 1966. Working as his own salesman, sometimes his own truck driver, Smith[1] has experienced a steady growth in his business. (R 186).

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1. References to the Petitioners in this Petition will be in the singular. For the sake of clarity, references will be either to the "petitioner" or to "Smith."

Gross sales during his first year, 1966, were approximately $119,000 (R 185-186)—increasing to about $447,000 for 1969. The largest portion, 65% to 75%, of these sales were made to retail grocery stores. (R 191). Smith became aware of the great potential of this market for the sale of automotive supplies from his long experience in the grocery wholesale business. (R 185). He knew that many people serviced their own automobiles and that these persons would buy motor oil, oil filters and the like, if available, at their grocery store.

Smith's single largest customer is Warehouse Markets, a chain of grocery stores operating in the State of Oklahoma. From Smith, the Warehouse Markets stores purchased about $98,000 of automotive supplies, during 1966; and $226,650 during 1969. (R II 58). Smith's second largest customer is another grocery chain—the Red Bud Stores, independent stores operating under the trade name owned by Respondent. Although comparable in size, location and customer type to Warehouse Markets, Smith's total sales to the Red Bud Stores have, however, been much lower. (R II 58, pl. exhibit 21). In 1969, Smith sold $226,650 to Warehouse Markets; he sold only $23,017 to the Red Bud Stores. One reason for this difference is that the Red Bud Stores, even though many of them are independently owned, are obligated by contract to buy from the Respondent, Scrivner-Boogaart. This contract is the subject of this suit.

Scrivner-Boogaart, a large integrated grocery company, manufactures, wholesales and retails grocery items. Operating in several States and supplying some 120 retail outlets from a stock of 8,000 items, Scrivner-Boogaart, for the fiscal year ending June 30, 1969, had gross sales of approximately $110,000,000 of which about $60,000,000 was attributable to sales in Oklahoma. (R 77-78).

At the retail level, Scrivner-Boogaart owns and operates Red Bud Stores; in the Tulsa, Oklahoma area, the principal trade area of Smith, Scrivner-Boogaart owned 4 stores either in whole or in part. Other Red Bud stores are independently owned and operated under the Scrivner-Boogaart trade name. Twenty-five (25) of these independently owned stores operate under a sublease agreement which includes a standard clause requiring the independent retailer to purchase from Scrivner-Boogaart an amount equal to 65% of the retailers' total monthly net sales and to participate in certain dealer services performed by Scrivner-Boogaart. This standard clause found in the twenty-five (25) subleases is as follows:

XVII

SERVICES AND REQUIREMENTS

> Sub-Lessee shall participate in all dealer services and programs provided by Sub-Lessor, including, but not limited to, store accounting service, Red Bud advertising, frozen food plan, sign rental and store remittance service. During the term of this Sub-Lease Contract and any extensions or renewals thereof, Sub-Lessee shall purchase from Sub-Lessor, each month, so much of Sub-Lessee's merchandise requirements, including dry groceries, health and beauty aids, frozen foods, fresh produce, fresh and cured meats and other items purchased for resale, as shall equal, in dollar volume, sixty-five per cent (65%) of Sub-Lessee's total monthly net sales. If Sub-Lessee violates any of the provisions of this paragraph, Sub-Lessor, at its option, may cancel and terminate this Sub-Lease Contract.

Scrivner-Boogaart finds persons to enter into a sublease agreement with this restrictive clause by financing the opening of the retail outlet. After locating the premises, Scrivner-Boogaart installs the fixtures and equipment,

and stocks the store with inventory. Two agreements are executed by the sublessee: The standard sublease and a security agreement which provides in the opening paragraph that:

> "Owner desires to borrow money from Scrivner and for the purpose of inducing Scrivner to make such loan, Owner desires to enter into this agreement." (R II 34).

One of the conditions is that so long as any portion of the indebtedness remains unpaid, the sublessee will purchase from Scrivner-Boogaart *"all of the Owner's merchandise requirements,* including dry groceries, produce, health and beauty aids, frozen foods, meats and other items purchased for resale." (R II 34) (emphasis added).

Under the sublease, the independent dealer must buy from Scrivner-Boogaart an amount equal to 65% of the retailers' monthly net sales. Considering the grocery mark-up at about 20% (R 84), the sublessee is obligated to buy about 80% of his merchandise requirements from Scrivner-Boogaart. Whatever freedom is left to the independent retailer operating under a restrictive sublease must be used to purchase those items that Scrivner-Boogaart does not stock—such as beer, soda pop, crackers, cookies, and bread. (R 79). Scrivner-Boogaart stocks the produce sold by the Petitioner, Smith. (R II 46).

There is little, if any, room for the independent retailer restricted by one of the twenty-five (25) Scrivner-Boogaart subleases to buy automotive supplies from Smith. If a retailer did buy from Smith, that retailer would also become obligated to buy from Scrivner-Boogaart an amount equal to 65% of what the retailer received from the sale of Smith products. To buy from Smith, an independent retailer obligated to Scrivner-Boogaart must violate the contract. But if the restrictive clause is violated, the sublease can be

terminated; the entire indebtedness can become due; and Scrivner-Boogaart gains the right to foreclose the security agreement and take possession of the store. (R II 18, 35).

The independent grocery retail outlets operating under one of the restrictive subleases must also agree to participate in Scrivner-Boogaart's accounting services (R II 18), meaning that Scrivner-Boogaart, the supplier, does the accounting for the independent retail outlets. And for this service, Scrivner-Boogaart charges the retailer about $60.00 per month. (R 87-88). Through this accounting service, Scrivner-Boogaart can keep a close check on the retailer.

Smith, nonetheless, was able to sell to a few of the independent Red Bud stores. (R II 58). During his first full year, 1966, Smith sold automotive supplies to three of the Red Bud stores. (R II 58). However, Scrivner-Boogaart issued direct warnings to these stores that they were in violation on contractual obligations. On November 11, 1966, Scrivner-Boogaart, in a letter sent to the owner of one of the Red Bud stores buying from Smith, wrote:

> "Paragraph XVII of the Sublease Contract, dated July 2, 1963 between Scrivner-Stevens Company and Fred Latham, Jr., provides." (Whereupon the Sublease Agreement, paragraph XVII was set forth in full.) "It has come to our attention that you have been violating this provision by failing to purchase from this company all of the requirements for sale upon the sub-leased premises." (R II 30).

The owner was then informed that if he continued to fail to comply, the sublease would be terminated.

On December 6, 1966, Scrivner-Boogaart sent a letter to the sublessee of another Red Bud store and gave notification that the sublease was terminated and that the security agreement would be foreclosed. (R II 32). On the same date, Scrivner-Boogaart filed legal action in

the Oklahoma State Courts to foreclose the security agreement. (R 164-165). As a result of this foreclosure, all independent wholesalers in competition with Scrivner-Boogaart who had sold merchandise to this store on credit suffered a direct loss. Concerning this loss to creditors, Roy Brandell, then Treasurer of Scrivner-Boogaart, declared that those creditors could "go to hell". (R 180, 248).

Smith had extended credit to this Red Bud store, and at the time of the Scrivner-Boogaart foreclosure, the store owed Smith $884.01. (R II 47). Since the foreclosed store was incorporated the debt was uncollectable. Scrivner-Boogaart, subsequent to this termination, subleased another store to this same operator. The reasonable inference that can be drawn from these facts is that Scrivner-Boogaart by foreclosing the security agreement was actually seeking to apply pressure on the competing wholesalers such as Smith—to keep him and other independent wholesalers from selling to the Scrivner sublessees.

Scrivner-Boogaart describes its merchandising plan as the "total program concept." (R 144). This was explained to mean that all the grocery wholesalers, engaged in the same type of plan, furnish everything for their respective stores. Scrivner-Boogaart will call on a store serviced by a competing wholesaler but not for the purpose of selling to that store any products. Testimony indicated that Scrivner-Boogaart would call on these other stores only for the purpose of bringing them into the total program—where they will buy their goods from Scrivner-Boogaart only and will participate in the services provided by Scrivner-Boogaart. (R 144-145, 154-155).

Besides the accounting services that permit Scrivner-Boogaart to keep its eye on the performance of its customers, the stores operating under one of the restrictive

subleases are obligated to participate in the Scrivner-Boogaart advertising program. Part of this program involves a weekly meeting attended by one representative of each of the retail stores and a representative (field counselor) of Scrivner-Boogaart who acts as the coordinator of the group. (R 89, 148).

The admitted purpose of these weekly meetings was to "select the price" (R 148) finally agreed upon by the representatives of the retail stores that would be placed in the weekly newspaper ad.

2. Proceedings Below

Smith filed suit to challenge the legality of the Scrivner-Boogaart practices on August 16, 1967, and sought damages and injunctive relief under Section 4 (15 U.S.C. sec. 15) (App. D, A14) and Section 16 of the Clayton Act. (15 U.S.C. sec. 26) (App. D, A15). Respondent is charged with a violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act. The District Court for the Northern District of Oklahoma, in which court the complaint was filed, had proper jurisdiction and venue according to Section 4 of the Clayton Act and Section 12 of the Clayton Act. (15 U.S.C. sec. 22) (App. D, A14, A15).

Petitioner-plaintiff, after preliminary discovery, filed a motion for summary judgment on April 22, 1968. Respondent-defendant had filed a motion for summary judgment on April 2, 1968. Both motions were denied by the trial court on May 9, 1969.[2] The case was tried before a jury on March 10-12, 1970 which returned a verdict in favor of the defendant in the following form:

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2. The long delay in ruling on the motions for summary judgment was due to the illness of the trial judge.

> "We the jury, find that the defendant did not violate Section 1 of the Sherman Act and find for the defendant."
>
> "We the jury, find that the defendant did not violate Section 3 of the Clayton Anti-Trust Act and find for the defendant." (R 300).

Findings of fact and conclusions of law, prepared by defendant, were filed March 26, 1970. The District Court adopted the conclusion of the jury in denying injunctive relief to the plaintiff—the order was filed March 30, 1970. (App. A, A1, A2).

Notice of appeal was filed by plaintiff on March 19, 1970 with a supplemental notice of appeal filed by plaintiff on April 8, 1970. Briefs were filed by both parties and the case was argued before the Tenth Circuit in March 1971. On June 21, 1971, the Tenth Circuit affirmed the judgment below, and on October 22, 1971, plaintiff's petition for rehearing was denied. (App. C, A12). This Petition was then filed.

REASONS FOR GRANTING THE WRIT

I. This Writ Should Be Granted for the Reason That the Tenth Circuit Has Decided a Federal Question in a Way in Direct Conflict with Applicable Decisions of This Court.

The Tenth Circuit decision in this case, if allowed to stand as the law of that Circuit, will have the immediate effect of completely foreclosing the Petitioner from a significant share of the retail grocery market. With this opinion, the obvious anticompetitive practices of Scrivner-Boogaart become the legally accepted way for all grocery wholesalers. The item by item competition will be replaced by some form of competition among full line grocery wholesalers for the right to become the exclusive supplier of independent grocery retailers.

As a single line company, the Petitioner who sells automotive supplies to retail grocery stores and does not offer a complete program can never hope to compete with Scrivner-Boogaart and the other large grocery wholesalers even in a single line of commerce. Neither can the man who sells eggs or produce or other single line items. The hope of preserving the small businessman in our economy has been destroyed by the Tenth Circuit opinion. We are left with a market that is divided among the full line companies.[3]

Scrivner-Boogaart had at the time of the trial 25 independent grocery retailers in the State of Oklahoma obligated to buy exclusively to the extent of the 65% provision in the subleases. The other grocery wholesale companies were engaged in this same exclusionary practice. That this practice is prevalent in the food industry makes the matter even more critical. Where the necessaries of life are involved, our courts must be much more sensitive to the antitrust implications. Under the plan defended by Scrivner-Boogaart and upheld by the Tenth Circuit, the price for food and other grocery items is determined by the few men who control the grocery wholesale businesses.

The natural consequences of the Scrivner-Boogaart business scheme should be considered in light of the views expressed when Congress was considering the need for the Sherman Act. Senator George declared that:

> "It is a sad thought . . . that the present system of production and of exchange is having that tendency

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3. A "full line company" as used herein refers to the type of program offered by Scrivner under which a retailer buys his merchandise from and participates in services offered by wholesaler.

> which is sure at some not very distant day to crush out all small men, all small capitalists, all small enterprises." 21 Cong. Rec. 2598 (1890).

Commenting on this same period of American history, Justice Harlan observed that: in 1890 there was a deep feeling of unrest. The fear was that another kind of slavery would be fastened on the American People, "namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the *production and sale of the necessaries of life.*" *Standard Oil Co.* v. *United States*, 221 U.S. 1, 83-84 (1911) (concurring and dissenting opinion) (emphasis added).

Of all the areas of our economy, it is most important that free competition be vigorously enforced and preserved in the grocery industry. When free competition fails in this area, the entire consuming public, the rich as well as the poor, suffers. Until we are willing to accept permanent controls on the price for food and other items purchased in a grocery store, the only force to keep prices down is free competition.

There is a significant need for this Court's power of supervision if free competition is to return to the food industry. Probable jurisdiction has already been noted in the case, *United States* v. *Topco Associates, Inc.*, 319 F.Supp. 1031 (N.D.Ill. 1970), 91 S.Ct. 1374 (1971). *Topco* and the present case are similar in that each involves restrictions imposed on independent grocery retailers which restrictions are alleged to be illegal per se. The dissimilarity is in the nature of the restraints with the Scrivner-Boogaart restrictions being far more pernicious and without any redeeming virtues. Together, the two cases will furnish to this Court a broad over-view of the type of restrictions imposed on independent grocery retail outlets.

This Court has, of course, already made its position fairly clear about the restraints in the nature of tying agreements or exclusive dealing arrangements that restrict the freedom of independent retailers or purchasers. Petitioner with his challenge to the legality of practices of Scrivner-Boogaart was relying on the teachings of: *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357 (1965); *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969); *FTC* v. *Brown Shoe Co.*, 384 U.S. 316 (1966); *FTC* v. *Texaco, Inc.*, 393 U.S. 223 (1968); *International Business Machines* v. *United States*, 298 U.S. 131 (1936); *International Salt Co., Inc.* v. *United States*, 332 U.S. 392 (1947); *Northern Pacific Ry.* v. *United States*, 356 U.S. 1 (1958); *Standard Oil Co. of Calif.* v. *United States*, 337 U.S. 293 (1949); and *United States* v. *Arnold Schwinn Co.*, 388 U.S. 365 (1967).

How stable is our system of jurisprudence if small businessmen, such as Smith, are unable to rely upon the precedent of this high Court. These small businessmen do not have available to them any self help measure that is associated with economic power. Without the confidence that the decisions of this Court will be followed by lower courts, the only alternative is for the small businessman to accept his foreclosure from those markets preempted by the large corporations that can offer a total program and that can obligate the independent retailer by contracts such as those used by Scrivner-Boogaart. The incentive to reach out and exert the efforts of imagination of the individual who desires to start and build new businesses will eventually be destroyed. Smith does not ask for any advantages; he seeks only the right to compete with whomever is in the market.

Following the teachings of this Court as expressed in the controlling opinions, Smith has satisfied his burden

of proof that the practices of Scrivner-Boogaart were illegal under the antitrust laws. Proof of dominance as the Petitioner understands it is required only to show that the defendant was capable of restraining commerce in a not insubstantial amount. The existence of 25 restrictive subleases that obligated independent retailers to buy from Scrivner-Boogaart is a fact from which the lower courts could have inferred dominance. Handler, Antitrust: 1969, 55 Cornell L. Rev. 161, 162-163 (1970).

There was, however, much more evidence than the mere existence of the contracts. The relationship of Scrivner-Boogaart to the sublessees was banker, supplier and landlord. *FTC* v. *Texaco,* 393 U.S. 223 (1968). This was power in the hands of Scrivner-Boogaart. With the additional power to terminate the business of an independent retailer, a power that Scrivner-Boogaart did in fact use, there was dominance.

Petitioner likewise proved that the amount of commerce foreclosed by Scrivner-Boogaart was not insubstantial. Perhaps from the record of this case, this Court cannot tell with mathematical certainty how much commerce was foreclosed; however, there is sufficient proof to satisfy the burden placed on treble damage plaintiffs. Petitioner does not understand that his burden is to prove the amount of commerce foreclosed in terms of mathematical certainty.

Scrivner-Boogaart had 25 independent retail grocery stores under a restrictive sublease. Three of these sublease stores that operated in Tulsa, Oklahoma had total sales in 1969 of $4,027,737. (R II 60). This is proof enough that the amount of commerce foreclosed was not insubstantial. In the *Fortner* case, this Court said that $200,000 of a market foreclosed by a tying arrangement cannot be considered "paltry or insubstantial."

Even though this Court has long recognized the importance of private antitrust litigants and has directed trial and appellate courts to observe the practical limits of the burden of proof, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 89 S.Ct. 1562, 1576 (1969), the Tenth Circuit imposed upon the Petitioner the onerous burden expressed in terms of *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961). If this case is ever allowed to control and make legitimate the exclusionary practices of Scrivner-Boogaart, the very foundation of the concept of free competition will be destroyed.

Tampa Electric must be limited to the facts of that case. A comparison of that case with the present situation will illustrate an extreme degree of difference. Tampa Electric was a public utility company subject to state regulations as to rates and practices. Scrivner-Boogaart on the other hand is a private company operating within the free competitive market; there are no public regulations that control the prices charged by Scrivner-Boogaart. In *Tampa Electric*, the alleged restraint on competition involved a single seller; a single buyer; and a single contract. The practices of Scrivner involved many buyers; the anticompetitive device of Scrivner involved an almost complete line of grocery store products; and by its very nature, the Scrivner restrictive sublease was anticompetitive.

The lower courts failed to see the real anticompetitive impact of the practices of Scrivner-Boogaart because the Petitioner was so much smaller than Scrivner-Boogaart. It was noted by the Tenth Circuit that the Red Bud stores stocked only 1% of their total inventory in automotive accessories; that Scrivner-Boogaart had only 4 stores in the Tulsa area under a restrictive lease; and that out of 8,000 items stocked by Scrivner-Boogaart, only 14 were in the

automotive supply line. The conclusion was that the competitive impact was de minimus.

This means that a large company such as Scrivner-Boogaart can eliminate competition item by item or company by company until there is total destruction of free competition. In terms of value, salt must be an insignificant item in a grocery store; however, to protect the concept of free competition even this single item would have to be protected. The converse is also true. If Smith is allowed entry into the retail grocery market by having the Scrivner-Boogaart sublease declared illegal, the door to free competition is open for all small independent suppliers who handle a single line of products.

This Court has long recognized that the antitrust laws were passed by Congress "to perpetuate and preserve for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." *United States* v. *Aluminum Company of America*, 148 F.2d 416, 429 (2d Cir. 1945). Recognizing this basic Congressional purpose, this Court has ruled that the foreclosure from a market of even a small company could not be justified on the ground that the effect on competition was de minimus. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

The departure from accepted precedent has been so great in this case that the supervision of this Court is vitally needed.

II. This Writ Should Issue for the Reason That the Trial Court So Departed from the Accepted and Usual Course of Judicial Proceedings for Antitrust Cases As to Call for an Exercise of This Court's Power of Supervision.

Trial judges, in antitrust cases, carry an extremely heavy burden and responsibility, for seldom is the ultimate

decision limited to the parties involved in the litigation. Private antitrust plaintiffs insure an effective and vigorous enforcement of those laws designed to preserve the concept of free competition. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 89 S.Ct. 1562, 1576-77 (1969); *Bigelow* v. *RKO Pictures, Inc.*, 327 U.S. 251 (1946).

Effective enforcement of these laws requires that the trial courts retain control over all the legal issues involved. In a footnote to this Court's opinion in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964), the responsibility of the trial judge was reviewed through a quote from a speech made by Judge J. Skelly Wright:

> "Many courts simply decide the case in favor of the plaintiff or the defendant, have him prepare the findings of fact and conclusions of law and sign them. This has been denounced by every court of appeals save one. This is an abandonment of the duty and the trust that has been placed in the judge by these rules."

Judicial control of the legal issues was not maintained by the trial judge in the present case. Though the trial of the case was before a jury the trial judge is not relieved of any responsibility. In fact the judicial burden might even increase when a jury is involved. As Professor Areeda has observed: "The layman's judgment has little relevance to antitrust policy." P. Areeda, Antitrust Analysis, 45 (1967). Instructions given to the jury and approved by this Court in *United States* v. *Trenton Potteries*, 273 U.S. 392 (1927), was that the duty of the jury was to determine if there existed a price fixing agreement—not to determine if the agreement was reasonable and thus legal. *Id.* at 395.

There were no facts for the jury to determine in the present case; its role should have been limited to the determination of the amount of injury suffered by Petitioner as a result of Scrivner-Boogaart's antitrust violation.

Prior to the trial, the parties had stipulated in a pre-trial hearing that Scrivner-Boogaart held subleases that obligated the retail grocery store to buy from Scrivner to the extent of the 65% provision. (R 68). It was further admitted by Scrivner that the dealer services in which the Sublessee was obligated to participate did exist. (R 68). It was undisputed that Scrivner-Boogaart had, at the time of the trial, 25 independent stores obligated through a sublease agreement. It was undisputed that Scrivner-Boogaart had sent warning letters to stores that failed to buy the required amount from Scrivner. It was undisputed that Scrivner-Boogaart actually terminated a sublease and foreclosed a security agreement because the owner had breached his promise to buy from Scrivner-Boogaart. And it was undisputed that the stores operating under the trade name owned by Scrivner-Boogaart, including those stores independently owned and those retail stores owned by Scrivner, sent a representative to a weekly meeting attended by a representative of Scrivner-Boogaart to discuss and set prices. There were other facts admitted to be beyond dispute which have been covered in other parts of this Petition.

With a record of undisputed facts, there was nothing relating to the legality of the agreement that had to be decided by a jury. Had the trial court followed the teachings of this Court that have through many written opinions been clearly articulated, it would have decided the question of law independent of the jury. Instead of maintaining control of the legal issue, the trial judge submitted the general question of liability to the jury which returned the verdict that: we the jury, find that the defendant did not violate the specified sections of the antitrust laws. (R 300).

Very little room was left for the jury to return a verdict for the plaintiff. Evidence introduced by the plaintiff

to prove the extent of his injury was effectively eliminated by a combination of the judge's comments during the trial and his subsequent instructions to the jury. The specific item of damages ($884.01) shown by the plaintiff to have been a loss incurred when Scrivner-Boogaart terminated one of the subleases was excluded from any consideration by instruction of the judge. (R 291). Other than this special item of damages, the plaintiff had sought to prove his injury resulting from Scrivner's antitrust violation through a market comparison of the Warehouse Markets and the Red Bud Stores. These two similar markets were compared in several different ways: size, location, customer type, and sales made by Smith to each. (R 200-205). On the basis of this comparison, Smith estimated the amount of profit lost as a result of the Scrivner-Boogaart restrictive subleases.

Scrivner-Boogaart objected to the introduction of this comparison of markets on the grounds that it was highly speculative. In its trial brief submitted to the trial court, Scrivner-Boogaart had conceded that a comparison of markets was the proper way for the assessment of damages. (R 62). The trial court did not sustain the objection about this market comparison; however, it did state that: "It is highly speculative but I will tell the jury that it is." (R 202). Combined with the instruction (which if standing alone would not be an improper instruction) that the jury will disregard all evidence which is speculative, the trial judge's comment on the market comparison excluded that evidence from which a jury might have been otherwise able to draw a reasonable inference. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946).

Even if the plaintiff had failed in his proof of damages, he certainly faced a threatened loss just as long as the exclusionary contracts of Scrivner-Boogaart were allowed to remain in effect. The jury, however, was allowed to

find that the contracts did not violate the antitrust laws, and the trial judge adopted this conclusion in denying injunctive relief. Because the jury was permitted by the trial judge to consider subjective reasons offered by Scrivner-Boogaart to show why the restrictive subleases should not be held illegal, the jury was cast into a role of trying to second guess Congress's reasons for passing the antitrust laws. Scrivner-Boogaart offered a list of 26 subjective advantages of the subleases. (R II 80-81). The list actually shows the anticompetitive features of the subleases. One of the justifying reasons offered and considered by the jury was:

> "Elimination of salesmen—which allows the owner time to manage and to greet his customers." (R II 81).

The elimination of salesmen is accomplished by the fact that the independent grocery retailer is obligated to buy from Scrivner-Boogaart. But the elimination of salesmen means that free competition has also been eliminated.

Petitioner believes that this Court has rejected the justifying arguments submitted by Scrivner-Boogaart. *United States* v. *Socony-Vacuum Oil Company*, 310 U.S. 150 (1940). The Tenth Circuit, by sanctioning the use of these subjective justifications, has granted to Scrivner-Boogaart the power to decide which companies will be permitted to sell to independent grocery retail stores. Such important decisions should not be made by any individual who holds the economic power of Scrivner-Boogaart. The more reliable force for a determination of who shall have entry into a market is free competition.

The advantages of the Scrivner-Boogaart restrictive subleases belong only to Scrivner-Boogaart. If there are advantages to anybody else, the advantages are at most

tenuous. If Scrivner-Boogaart can give any advantage to others, they can be taken away at the whim of Scrivner-Boogaart. As noted by this Court in *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397-398 (1927): power reasonably exercised today may become power unreasonably exercised tomorrow.

CONCLUSION

If the small businessmen of this country are not to be eliminated, trial courts must not construct insurmountable obstacles to private antitrust suits. This case was filed on August 16, 1967, and the Petitioner, with his very limited resources, is still trying to obtain the relief that would allow him to compete with Scrivner-Boogaart in the retail grocery market. Unless the Scrivner-Boogaart subleases are declared illegal, the Petitioner is foreclosed from virtually all of the retail grocery market.

No clarification of the law is necessary in this case unless it would be to expressly restrict the *Tampa Electric* opinion. This Court through many recent decisions has made its position clear. What is needed in this case, therefore, is some direction from the Court that the applicable opinions be followed. The practices of Scrivner-Boogaart should be declared illegal per se by this Court and the case should be remanded with direction for the lower court to issue injunctive relief and to allow the Petitioner an opportunity to prove his damages.

That this Court's supervisory power can be applied, it is urged that this writ be granted.

Respectfully submitted,

STAN P. DOYLE
P. O. Box 4470
Tulsa, Oklahoma 74104

APPENDIX "A"—FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA (R 73)

(Filed March 26, 1970)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JIMMY T. SMITH, an individual and SMITH SALES CO., a corporation,
Plaintiffs,
vs.
SCRIVNER-BOOGAART, INC., a corporation,
Defendant.
} 67-C-153

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The minute order and judgment of this Court, entered March 13, 1969, denying the plaintiffs' prayer for injunctive relief in the instant case is hereby amplified and amended to include the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Court finds, concurs and adopts the finding of the jury that there has, as a matter of fact, been no violation of either Section I of the Sherman Antitrust Act or Section III of the Clayton Act by the defendant, and that there was no unreasonable restraint of trade or commerce caused by the defendant.

That the plaintiffs' evidence did not establish a per se violation of either Section I of the Sherman Act or Section III of the Clayton Act.

That the plaintiffs herein failed to prove any damage unto themselves or threat of damage by virtue of any act of the defendant.

CONCLUSIONS OF LAW

That there has, as a matter of law, been no showing by the plaintiffs of any violation of the Federal Antitrust Laws nor any threatened breach of the same by the defendant such as to entitle the plaintiffs to an injunction against the defendant as prayed in the plaintiffs' complaint, and the same should, therefore, be denied. The prayer for injunctive relief is hereby denied.

ENTERED this 26 day of March, 1970.

s/ Allen E. Barrow
United States District Judge

APPENDIX "B"—OPINION OF THE COURT OF APPEALS, TENTH CIRCUIT

1971 CCH Trade Cases, [¶ 73,611] Jimmy T. Smith and Smith Sales Co. v. Scrivner-Boogaart, Inc.

U. S. Court of Appeals, Tenth Circuit, May Term, 1971. No. 322-70. Filed June 21, 1971. Appeal from U. S. District Court, Northern District of Oklahoma (District Court No. 67-C-153).

IN THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 322-70

JIMMY T. SMITH, an Individual, and SMITH SALES CO., a Corporation,
Appellants,

vs.

SCRIVNER-BOOGAART, INC., a Corporation,
Appellee.

Sherman Act

Tying—Subleases—Financing—Control of Tying Product—Effect on Commerce.— A jury finding that a wholesaler of automotive accessories failed to show that one of its competitors imposed illegal tying agreements on its lessee retailers, was upheld. The lease, assertedly the tying product, includes a standard clause that requires the retailer to purchase from the wholesaler 65% of the retailer's total monthly net sales and to participate in cer-

tain dealer services rendered by the wholesaler. The complaining wholesaler did not meet the burden of his case under FORTNER ENTERPRISES, 1969 Trade Cases ¶ 72,757. He did not show that his competitor had the requisite dominance or control over the tying product and that the effect of the tying arrangement was not insubstantial. For example, there were only four of the challenged sublease agreements in effect in the area of competition in a market that had over 400 stores; out of the 8000 items in the challenged wholesaler's line only 14 were in the automobile accessory area. In addition, the court did not err in submitting the question to the jury. See ¶ 2930.45.

Exclusive Dealing—Subleases—Effect on Commerce. — A jury finding that a wholesaler of automotive accessories failed to show that one of its competitors imposed illegal exclusive dealing contracts on retailers was upheld. The exclusive dealing arrangement must be likely to foreclose competition in a substantial portion of the line of commerce affected. The evidence presented by the complaining party was not sufficient to warrant a finding of a *per se* illegal exclusive dealing contract. See ¶ 2910.

For appellants: Stan P. Doyle and Richard E. Hancock, Tulsa, Okla. For appellee: Jack R. Givens, Tulsa, Okla.

Before CLARK,* Associate Justice; SETH and HOLLOWAY, Circuit Judges.

CLARK, Associate Justice: This appeal seeks to overturn a jury verdict in an antitrust suit involving alleged violations of Section 1 of the Sherman Act and Sections 3 and 16 of the Clayton Act. Specifically, Jimmy T. Smith

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*Associate Justice, United States Supreme Court, Retired, sitting by designation.

and Smith Sales Company, a corporation, appellants, wholesalers of automotive accessories, chemicals, etc. claim that Scrivner-Boogaart, Inc., a corporation, appellee, a wholesale-retail grocer and manufacturer is guilty of a *per se* violation of the antitrust laws in that it exacted agreements from appellants requiring them to purchase so much of appellants' merchandise requirements for resale as shall equal in dollar volume 65 percent of their monthly sales; that, in any event, the agreements were an unreasonable restraint of trade or commerce under § 1 of the Sherman Act; that the form of the verdict as submitted to the jury was erroneous in that it called solely for the legal conclusion of the jury as to whether appellee violated the antitrust laws of the United States; and, finally, that the rulings of the trial judge excluding certain evidence as to damages were erroneous and his refusal to instruct that the agreements were a *per se* violation of the antitrust laws was invalid. We have carefully studied the entire record and have been unable to find support for appellants' claims as to violations of the antitrust laws and therefore affirm the judgment without reaching the issue of damages.

I.

Background of the Parties and the Market:

The appellants began business in 1965 in Oklahoma in the wholesaling of a line of about 400 items of automotive accessories, automobile additives, chemicals, major brands of motor oil, oil filters, tools, charcoal, charcoal lighters and sunglasses. Appellants serviced the Tulsa area, primarily, with some sales in Picher and Oklahoma City, Oklahoma. Their customers included service stations, automobile garages, discount houses and retail grocery concerns. The latter made up 65 percent to 75 percent of their total sales, which in 1966 were $119,000,

but by 1969 had reached $447,000 with gross profits of $56,519. Appellant's largest customer was Warehouse Markets, a chain of 15 stores, with gross purchases from appellants of $226,650 in 1969. Red Bud Stores was their number two customer with $23,017 in 1969 although the appellee was its primary supplier. Appellants contend that this wide disparity in its sales to Warehouse Markets and Red Bud is due to an illegal tying and exclusive dealing arrangement between Red Bud and appellee. However, Red Bud only stocked 1 percent of their total inventory in the automotive and accessory line.

The appellee is an integrated manufacturing and wholesale-retail concern that handles some 8000 items in the grocery and affiliated lines. Fourteen of these are in the automobile accessory line which is in competition with appellants. While the record does not show the amount of sales of appellee in the automobile accessory line, we do know that its total sales in all 8000 items approximates $110,000,000 annually to some 120 stores in Oklahoma, Texas, Arkansas, Nebraska and South Dakota. Some $60 million of this total is sold in Oklahoma. The relevant market in which appellant operates is Tulsa and its vicinity where there are over 400 retail grocery establishments, out of which the appellee serves ten. The appellee services most of its customers in the usual wholesale-retail manner; however it serves 25 of its outlets in Oklahoma under a sublease agreement. Four of these are in the Tulsa area where the appellee also owns 4 stores either in whole or in part and serves two others stores in the traditional manner.

II.

The Sub-Lease Agreements:

These contracts are in the customary form for leases of retail stores premises. However, the form includes a

standard clause[1] that requires the retailer to purchase from the appellee 65 percent of the retailer's total monthly net sales and to participate in certain dealer services rendered by appellee. When the usual 20 percent mark up on groceries and the necessity for goods other than those sold by appellee are considered the effect of this requirement is that a sub-lessee is forced to purchase about 80 percent of his requirements from appellee.

In addition, the required services include a complete accounting system, an advertising program, central billing and store remittance services, etc. furnished by appellee at additional fees. Under the advertising program the independent retail managers of the sub-lessee stores meet at regular intervals to agree on what items will be placed in media advertising and the price that will be charged for each item.

Appellants contend that the appellee is able to exact these restrictive terms from sub-leasees by agreeing to finance the opening of new stores, contracting for fixtures, furnishing a line of credit, providing the initial stocking of merchandise and making premises available, all on a reimbursable basis. While there are other wholesale grocers who perform similar services to consenting retailers

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1. "SERVICES AND REQUIREMENTS

"Sub-Lessee shall participate in all dealer services and programs provided by Sub-Lessor, including, but not limited to, store accounting service, Red Bud advertising, frozen food plan, sign rental and store remittance service. During the term of this Sub-Lease Contract. . . . Sub-Lessee shall purchase from Sub-Lessor, each month, so much of Sub-Lessee's merchandise requirements, including dry groceries, health and beauty aids, frozen foods, fresh produce, fresh and cured meats and other items purchased for resale, as shall equal in dollar volume, sixty-five percent (65%) of Sub-Lessee's total monthly net sales. If Sub-Lessee violates any of the provisions of this paragraph, Sub-Lessor, at its option, may cancel and terminate this Sub-lease contract."

frequently the merchant is unable to obtain financing without such terms. In the event a sub-lessee fails to perform the conditions of the lease the appellee then cancels it and forecloses. The record indicates one such instance being so handled. Another witness testified that she had been required to abide by the sub-lease requirements.

Appellant claims damages of $10,000 for loss of profits that they would have enjoyed from sales to appellee's sub-lessees but for the violations of the antitrust laws. They also claim specific damage of $884.01 which is the balance due them on an open account by a sub-lessee of appellee whom the latter had foreclosed and forced into insolvency. The jury returned a verdict for the appellee.

[*III. not designated.*]

IV.

Appellant's Contentions:

1. Appellant says that the sub-lease arrangement of the appellees is a *per se* violation of Section 1 of the Sherman Act under the rule of *Fortner Enterprises, Inc.* v. *United States Steel Corporation* [1969 TRADE CASES ¶ 72,757], 394 U.S. 495 (1969) and cases there cited. The Supreme Court has held that tying arangements—the sale of one product conditioned upon the purchase of another—are illegal. And that violations are *per se* provided a market leverage or control is present in the tying product and the market foreclosed is not *de minimus*. In *Fortner, supra,* the Court held that financial arrangements such as cash, credit, etc. may be the tying product and that sufficient dominance or economic control was present in the tying product even though it was effective "only with respect to some of the buyers" in the tied product. Here the appellant claims that the lease, financing, stocking of goods, etc.

was the tying product and that the 65 percent requirement together with the services were the tied one. The jury, however, found that the appellant did not meet the burden of his case under *Fortner*, i.e., neither the dominance nor control was present nor the effect *de minimus*. As much as we feel that contracts such as are under attack here are suspect, we must respect this finding of the jury on the basic facts necessary to support a *per se* violation. The instruction[2] of the court to the jury was quite sufficient advising in the very language of *Fortner* that the standard was not one of monopoly power or dominance throughout the market for the tying product but could be sufficient even though it exists as to some buyers and might be inferred from the tying product's desirability to consumers or uniqueness in its attributes.

2. Nor do we feel that the court erred in submitting the question to the jury. The proof is exceedingly weak, not only failing to show the extent of the market in automobile and accessory goods but being entirely silent on the effect of the sub-lessee agreement thereon. There is also affirmative evidence that tends to disprove these necessary elements. For example, there were only four of the

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2. "The standard of sufficient economic power does not require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. The economic power over the tying product can be sufficient . . . even though the power exists with respect to some of the buyers in the market. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes * * * [U]niquely and unusually advantageous terms can reflect a creditor's unique economic advantages over his competitors. * * * Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied product, any restraint of trade attributable to such tying arrangements would obviously be insignificant at most."

sub-lease agreements in effect in the Tulsa area in a market that had over 400 stores; out of the 8000 items in the appellee's line only 14 were in the automobile accessory area; appellee had financed stores without the 65 percent requirement; and there were several other grocery wholesalers who were offering the same or a similar sub-lease arrangement. In our view the evidence was far too weak to support a directed verdict as the appellants requested.

3. Likewise we must conclude that the sub-lease was not an exclusive dealing contract which is illegal *per se* under Section 3 of the Clayton Act. The test is much more onerous than the one in tying arrangements. The exclusive dealing arrangement must be likely to foreclose competition in a substantial portion of the line of commerce affected. *Tampa Electric Co.* v. *Nashville Coal Co.* [1961 TRADE CASES ¶ 69,940], 365 U. S. 320, 327 (1961). We doubt if the evidence was sufficient to go to the jury, much less warrant a *per se* finding. However, the court submitted it to the jury under a fair instruction.[3] We cannot therefore, disturb the jury's finding on the § 3 Clayton Act claim.

4. Appellants also belatedly object to the form of the verdict[4] submitted to the jury and on which it acted. We

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3. "Even though the contract and/or sublease is found to be an exclusive dealing arrangement, it does not violate Section 3 of the Clayton Act unless it is probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected."

4. "We, the jury, find the defendant did not violate Section 1 of the Sherman Anti-Trust Act and find for the defendant.

"We, the jury, find that the defendant did not violate Section 3 of the Clayton Anti-Trust Act and find for the defendant."

believe it the better practice not to request the jury to pass on the ultimate legal issue, see P. Areeda, Antitrust Analysis, 45 (1967), but here the appellants fully and specifically agreed to the form of the verdict and the instructions of the court were both clear and sufficient for the jury to understand completely what it was doing by its verdict. We cannot at this time say that it was error. See *Northern Pacific RR Co.* v. *Urlin*, 158 U. S. 271 (1895); *Joseph* v. *Rowlen*, 425 F. 2d 1010 (C. A. 7, 1970); *Western Fire Ins. Co. of Fort Scott, Kan.* v. *Ward, et al.*, 131 F. 2d 541 (C. A. 5, 1943); 49 A. L. R. 2d 1301 (1954).

5. As we have noted, there is evidence in the record that independent grocers and managers of the sub-lease stores under the advertising program would hold meetings to "decide" on prices to be charged on items selected for features treatment in advertising. Price fixing has long been held to be unlawful *per se* under § 1 of the Sherman Act, regardless of the amount of interstate commerce involved. *United States* v. *Socony Vacuum Oil Co.* [1940-1943 TRADE CASES ¶ 56,031], 310 U. S. 150, 224 n. 159 (1940). Appellant did not allege nor submit his case on a price-fixing theory —either at the trial court or on appeal—and does not raise the point here. Nor is there any proof in the record of any price fixing on automobile accessory products. We mention this in passing since tying arrangements like those that call for exclusive dealings are suspect and when joined with any type of price fixing would be invalid without more.

6. Several additional claims as to the admission of evidence and other matters are without merit and we do not discuss them; nor do we, in view of our decision, reach the issues relating to damages.

The judgment is affirmed.

APPENDIX "C"—ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Office of the Clerk
Denver, Colorado 80202

Howard K. Phillips
Clerk

Telephone
303-837-3157

October 22, 1971

Re: No. 322-70, Jimmy T. Smith, et al. vs. Scrivner-Boogaart, Inc.

Mr. Stan P. Doyle
Attorney at Law
P. O. Box 4470
Donaldson Station
Tulsa, Oklahoma 74104

Dear Mr. Doyle:

An order has been entered today in the above case denying appellants' petition for rehearing.

Yours very truly,

Howard K. Phillips
Clerk
By /s/ Helen R. Bartha
Helen R. Bartha
Deputy Clerk

hkp:hb

CC: Mr. Richard E. Hancock
Attorney at Law, 1302 Philtower Bldg., Tulsa, Oklahoma;

Mr. Jack R. Givens
Attorney at Law, 1700 Fourth Natl. Bldg., Tulsa, Oklahoma;

APPENDIX "D"—RELEVANT STATUTES

I. Sherman Act, Sec. 1 (15 USC Sec. 1).

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty

thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

II. Clayton Act, Sec. 3 (15 USC Sec. 14).

§ 14. Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

III. Clayton Act, Sec. 4 (15 USC sec. 15).

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in

controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

IV. Clayton Act, Sec. 12 (15 USC sec. 26).

§ 22. District in which to sue corporation

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found. Oct. 15, 1914, c. 323, § 12, 38 Stat. 736.

V. Clayton Act, Sec. 16 (15 USC sec. 26).

§ 26. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.